Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

# TREATMENT OF ENEMY ALIENS

(Being Part XVI of Some Questions of International Law in the European War. Continued from previous numbers of the JOURNAL.)

## RIGHT OF ACCESS TO THE COURTS

*English and American Doctrine and Practice.* The question of the right of enemy subjects to sue in the courts of an adversary can hardly be said to be regulated by international law, unless the much-controverted Article 23(h) of the Hague Convention of 1907 respecting the laws and customs of war on land, is interpreted to apply to the actions of the judicial authorities. Certainly it is not true, as is sometimes asserted, that it is a principle of international law that they have no right of access to the courts of the adverse power. Like the practice in respect to trading with the enemy the matter is determined by the municipal law of each belligerent and is based upon considerations of public policy.[1] The early English common law rule was that an action could not be brought in an English court by or on behalf of an enemy alien except by virtue of a statute, order in council, proclamation or license from the Crown, or unless he came into the country under a flag of truce, or cartel, or in pursuance of some other act of public authority which put him in the King's peace *pro hac vice.* As long ago as 1454 Mr. Justice Ashton said that "an alien enemy who came here under the King's license or a safe conduct could maintain an action for trespass."[2] In the leading early case on the subject, *Wells* v. *Williams,* decided in 1698, and many times cited by the English courts during the recent war, it was held that, although an enemy alien was in England without a safe conduct, yet if he continued to reside there by the King's leave and protection and without molesting the government and without being molested by

[1] Compare Huberich, Trading with the Enemy, p. 191; also the recent Canadian case of *Korzwiski* v. *Harris Construction Co.* (1916), 18 Que. P. R. 97.

[2] 1 Salk. 45, quoted by the Court of Appeal in *Porter* v. *Freudenberg* (1915), 112 L. T. R. 313.

it, he could sue in the King's courts, for the exercise of such a right was a consequence of the protection offered him.[3] This rule was followed by Sir William Scott a hundred years later in the case of the *Hoop*[4] where he said:

In the law of almost every country the character of alien enemy carries with it a disability to sue or sustain, in the language of the civilians, a *persona standi judicio*. The peculiar law of our own country applies this principle with great rigor. The same principle is received in our courts of the law of nations. They are so far British courts that no man can sue who is an enemy, unless under the particular circumstances that *pro hac vice* discharge him from the character of an enemy, such as the circumstances mentioned above.[5]

The rigor of this ancient rule which virtually treated enemy aliens as *ex lege* and without the right of access to the courts has recently been criticized as "a relic of barbarous days when the lives and property of all enemies were forfeit to the victor;"[6] nevertheless it left open a loophole by which the English courts have in fact been able to open their doors to enemy aliens while at the same time respecting the general principle of the old doctrine. In practice, whenever an enemy subject resident in England has been able to show that he was there with an express or implied license of the King he has been allowed to appear in the courts either as a plaintiff or a defendant. The onus

[3] 1 Ld. Raym. 282. Some question was raised by Mr. Justice Younger, in the case of *Schaffenius* v. *Goldberg* (1915) as to the authenticity of the phrase quoted above "without being molested by the government," which does not appear in several reports of the case. The matter was discussed at some length by counsel.

[4] 1 C. Rob. 196, 201 (1799). The case law of England and the United States is reveiwed by Huberich in his work on Trading with the Enemy, pp. 191 ff.

[5] Mr. Justice Story, in his Notes on the Principles and Procedure of Prize Courts (p. 21), adopted the same principle.

[6] Such is the opinion expressed by the London *Solicitor's Journal and Weekly Reporter* of January 23, 1915. See also the criticism by Dr. Sieveking, *International Law Association Reports*, 1913, p. 169, who remarks that "there is no earthly reason why a subject of one of the belligerent powers should not be allowed to appear in the courts of the other nation and obtain a judgment, provided execution, unless out of funds in the enemy's country, be stayed until the termination of the war. The idea of his being an alien enemy and therefore having no *persona standi judicio* is too old to be seriously considered."

of showing this has not been difficult, for enemy aliens who are allowed to remain in the country after the outbreak of the war have generally been assumed to be there by an implied license under the protection of the Crown. This follows as a logical consequence of registration, internment and other similar measures. It amounts to this, therefore, that under this rule practically the only enemy persons to whom the courts were closed during the late war were those resident in the enemy country or who, though resident in England, were not regarded as being under the protection of the Crown.[7]

*Article 23(h) of the Hague Convention No. IV, of 1907.*—Until 1907 there was no doubt that belligerents were free to close their courts to enemy subjects at will, that is to say, the question was one solely of municipal law; but it is not quite clear whether that liberty of action was not surrendered by the adoption of Article 23(h) of the Hague Convention of 1907 respecting the laws and customs of war on land. This provision declares that it is especially forbidden "*de déclarer éteints, suspendus ou non-recevables en justice, les droits et actions des nationaux de la partie adverse.*" The prohibition which it establishes was added at the suggestion of two German delegates, Herr Göppert and General von Gründell, the latter of whom in explaining its purpose in the committee said its object was not limited to protecting corporeal property from confiscation but that it had in view "the whole domain of obligations, by prohibiting all legislative measures which, in time of war, would place the subject of an enemy state in a position of being unable to enforce the execution of a contract by resort to the courts of the adverse party."[8] In other words, its object was to prohibit belligerents from depriving enemy subjects by legislation or otherwise of the means of enforcing their legal rights

[7] Compare Picciotto, "Alien Enemy Persons, Firms and Corporations in English Law," *Yale Law Journal*, 27:172 (1917). A classification of the holdings of the English courts in respect to the right of enemy aliens to sue may be found in the brief of the Attorney General in the case of *Re Merten's Patents* (1915), 112 L. T. R. 315. The decisions are grouped under three heads: (1) those upholding the right to sue; (2) those denying the right; and (3) those which deny the right to sue as plaintiffs but uphold the right to sue as defendants.

[8] *Deuxième Conférence International de la Paix, Actes et Documents*, Tome III, p. 103.

through resort to the courts. It therefore overruled the doctrine of the English and American courts that contracts with alien enemies are generally suspended or terminated by the outbreak of war and that enemy subjects have no rights of action in the courts except under the peculiar circumstances mentioned by Sir William Scott and Judge Story referred to above.[9]

*English and American Interpretation of Article 23(h).*—English and American authorities have, however, placed a different interpretation on the meaning of Article 23(h) and the matter has been the subject of much controversy. According to their view the purpose of the article in question was merely to prohibit commanding generals and their subordinates in the field from suspending or extinguishing the legal rights of the inhabitants and did not contemplate a restriction on the right of the state through its legislative, executive, or judicial organs to exclude generally enemy subjects from bringing actions in its courts.[10] In favor of this view it is argued that the position of Article 23(h) clearly shows that it was intended merely as a limitation on the powers of military commanders in the actual theater of hostilities. It is a part of a chapter entitled "Means of injuring the enemy; sieges and bombardments," which is in turn a subdivision of a general heading entitled "hostilities," all the provisions of which relate to the conduct of operations by military commanders. This view is strengthened by the declaration contained in Article I, that "the high contracting parties will issue to their armed land forces, instructions which shall be in conformity with the 'regulations re-

[9] This interpretation is that adopted by the German Government in its official *Weissbuch, Über die Ergebnisse der im Jahre 1907 in Haag Abgehalten Friedenskonferenz*, p. 7.

[10] This is the view expressed by General Geo. B. Davis in his Elements of International Law, p. 578; see also an article by him entitled "Amelioration of the Laws of War on Land," *American Journal of International Law*, Vol. II, p. 70. See also Trotter, Effect of War on Contracts During War, supp. 1915, p. 20, who remarks that the provision in question does not affect the ancient rule of the common law, that an alien enemy, unless with special license or authorization of the Crown, has no right to sue in the King's courts during war. See also Higgins' *Hague Peace Conferences*, p. 235; Cobbett's Cases on International Law, Part II, pp. 85-86; Holland, *Law Quarterly Review*, Vol. 28, p. 94; Huberich, *op. cit.*, p. 45; and Picciotto, *Yale Law Journal*, 27:170 (1917).

specting the laws and customs of war on land' annexed to the present convention.'' The logical inference, therefore, is that Article 23(h) is one of the ''regulations respecting the laws and customs of war on land,''[11] and not a general rule of conduct for states in respect to the administration of justice.

The view of the British Government regarding the meaning of the clause was expressed by the Foreign Office in a letter of March 27, 1911, to Professor Oppenheim in response to an inquiry addressed by him on February 23 to the British Secretary of State for Foreign Affairs. Professor Oppenheim in his letter of inquiry called the attention of Sir Edward Grey to the fact that the interpretation which had been placed upon the clause by continental writers generally and even by some English and American authorities, a number of whom he cited, was in conflict with the old English rule. It was unfortunate, he added, that neither the English blue book relative to the Second Hague Conference[12] nor the official *procés verbale* of the conference indicated what was the purpose or intent of the provision. In its reply the Foreign Office, arguing mainly from the position which the article occupies in the text of the Convention, rejected the Continental interpretation and maintained that the article had no effect on the old English rule regarding the incapacity of enemy aliens to sue.[13]

[11] Professor Holland in commenting on this article (*Law Quarterly Review*, Vol. 28, pp. 94 ff.), remarks that "if this clause is intended only for the guidance of an invading commander it needs careful redrafting; if, as would rather appear, it is of general application, besides being quite out of place where it stands, it is so revolutionary of the doctrine which denies to an enemy any *persona standi in judicio* that although it is included in the ratification of the Convention by the United States on March 10, 1908, and the signature of the same on June 29, 1908, by Great Britain, it can hardly, till its policy has been seriously discussed, be treated as rule of international law." In his Laws of War on Land, p. 5, Professor Holland cites this paragraph as an instance of the inconvenience of intermixing rules relating to the duties of belligerent Governments at home with those intended to serve for the guidance of armies in the field.

[12] Parliamentary Papers, Misc. No. 4, 1907.

[13] Professor Oppenheim's letter and the reply of the British Foreign Office are printed in French in an article by M. Politis in the *Revue Gén. de Droit Int. Pub.*, 1911, pp. 250 ff. See also Trotter, Effect of War on Contracts During War, supp., p. 14, and Spaight, War Rights on Land, pp. 140-141. The Foreign Office,

*Views of Continental Publicists.*—Continental writers, however, almost without exception hold the contrary view. Among those who have so expressed themselves or who apparently assume that the German interpretation referred to above is the correct one may be mentioned Bonfils,[14] Ullman,[15] Wehberg,[16] de Visscher,[17] Sieveking,[18] Politis,[19] Despagnet,[20] Kohler,[21] Strupp,[22] Noldeke,[23] and Théry,[24] Dr. Sieveking, a German jurist, discussing the force of Article 23(h) before the International Law Association at its meeting in 1913, said:

I think there can be no doubt whatever as to the meaning of this Article: an alien enemy shall henceforth have a *persona in judicio standi* in the courts of the other belligerent for all his claims, whether they originated before or during the war; his claim shall henceforth no longer be dismissed or suspended on account of his being an alien enemy; he shall be entitled to a judgment on the merits of the case, and this judgment shall be immediately enforceable. It has been argued that this article merely conveys instructions to officers commanding in the field and in no way touches the dealings of the Home Government and the law at home. If this were so it would mean that the German delegates proposed an article devoid of any meaning. An article might just as well have been inserted saying that officers in the field are not allowed to contract alliances or to declare

in its reply to Professor Oppenheim's inquiry, stated that the English rule works automatically at the outbreak of war; "no declaration," it said, "is needed in order to make commercial intercourse with alien enemies illegal and to withdraw from them the protection of the courts. The outbreak of war, *ipso facto*, without any proclamation, abolishes, suspends, and makes inadmissible the rights of the subjects of the hostile party to institute legal proceedings."

[14] *Manuel de Droit Int. Pub.*, p. 651.

[15] *Völkerrecht*, 2d ed., p. 474.

[16] Capture in War on Land and Sea, p. 8; also *Rev. de Droit Int. et de Lég. Comp.* 1913, p. 197.

[17] *Du caractère ennemie et de la condition des Personnes ennemies quant à l'exercise de leurs droits civils, Law Quarterly Review*, July, 1915, pp. 289 ff.

[18] *International Law Association Reports*, 1913, pp. 175-178.

[19] *L'Article 23(h) du Réglement de la Haye, Rev. Gén. de Droit Int. Pub.*, vol. 18 (1914), pp. 249 ff.

[20] *Cours de Droit Int. Pub.*, p. 825.

[21] *Zeitschrift für Völkerrecht*, 1911, p. 384.

[22] *Ibid.*, vol. 8, pp. 56 ff.

[23] *Deutsche Juristen Zeitung*, April 1, 1917, p. 374, French translation by M. Dreyfus, 44 Clunet, pp. 1354 ff.

[24] *Recevabilité des Sujets Ennemis à Ester en Justice en France*, 44 Clunet, pp. 480 ff.

war. Officers commanding in the field have nothing whatever to do with courts of justice, except an officer in command of an occupied district. But the rules as to the rights and duties of the army and the non-combatants in occupied territories and the administration of such territories are laid down in Articles 42 to 56 (Articles 43 and 48 in particular); and this would be saying the same thing twice over. No, this article was meant as a blow at the rule of the British law, and this intention could not have been more clearly expressed than it has been in Article 23(h).

Nevertheless, as Dr. Sieveking points out, the prohibition established by Article 23(h) relates only to land warfare and inasmuch as the great majority of cases likely to come before the British courts originate in maritime transactions the article could have only a very limited application in a war between Great Britain and some other power, even if the German view as to its meaning were admitted.

M. Politis, professor of international law in the University of Paris, in a report made to the Institute of International Law at its session in 1910, likewise expressed the view that the effect of Article 23(h) is to prohibit belligerents from interfering with the execution of contracts made before the outbreak of war and to condemn the old rule in respect to the incapacity of enemy aliens to sue in the courts of the adversary. It forbids, he says, all legislative or other measures tending to invalidate or to prevent the execution of private obligations.[25] In an article published in the *Revue Générale de Droit International Public* in 1911,[26] M. Politis reviewed at length the opinions of the text writers, all of whom, with the exception of General Davis of the United States, he says, adopt the view stated above. The only argument of any weight in favor of the view of the English Government is, he adds, that drawn from the position of clause 23(h) in the text of the convention—"an argument which is not only contrary to the plain language of the provision itself as well as the declaration of Herr Göppert in the committee, but is contrary to the whole spirit of the Hague convention which was to ameliorate the old usages of which the English rule in respect to the judicial incapacity of alien enemies is one of the most rigorous and indefensi-

[25] *Annuaire de l'Institut de Droit International*, T. 23, p. 268.
[26] Vol. 18, pp. 249 ff.

ble.'' It is also true, as M. Politis points out, that the official English interpretation has been condemned by a number of the leading English authorities.[27]

*English Interpretation of Article 23(h) During the Recent War.*— The English Government, however, during the recent war proceeded in accordance with the interpretation adopted by the Foreign Office in 1911 and the English courts followed this interpretation. The question was first presented to a British court in the case of *Porter* v. *Freudenberg* in 1915.[28] Adverting to the divergence of views among jurists as to the meaning of the clause Lord Reading said the court was clearly of the opinion that the effect was not to abrogate the old English rule.

Our view, he said, is that Article 23(h), read with the governing Article 1 of the Convention, has a very different and a very important effect, and that the paragraph, if so understood, is quite properly placed as it is placed in a group of prohibitions relating to the conduct of an army and its commander in the field. It is to be read, in our judgment, as forbidding any declaration by the military commander of a belligerent force in the occupation of the enemy's territory which will prevent the inhabitants of that territory from using their courts of law in order to assert or to protect their civil rights. For example, if the commander-in-chief of the German forces which are at the present moment in military occupation of part of Belgium were to declare that Belgian subjects should not have the right to sue in the courts of Belgium, he would be acting in contravention of the terms of this paragraph of the article. If such a declaration were made, it would be doing that which this

[27] Phillipson, Effect of War on Contracts, p. 46; Higgins, *op. cit.*, p. 263; Lawrence, Principles, p. 358 (who says there can be little doubt that it was intended to have a different and far wider application); and Whittuck, International Documents, p. xxviii. Holland also apparently takes this view, for he remarks that the clause "seems to require the signatories to legislate for the abolition of an enemy's disability, to sustain a *persona standi in judicio*. Laws of War on Land, p. 5. Some American writers also adopt the Continental interpretation, *e.g.*, Bordwell, Law of War, p. 210; Gregory, Am. Jour. of Int. Law, Vol. II, p. 788; and Hershey, Essentials of Int. Pub. Law, p. 395, note 56.

[28] *Law Times*, Vol. 12, p. 313, 1 K. B. 857. President Monier, of the Tribunal of the Seine, in a decision of May 18, 1916 (*Wilmoth* v. *Daude*), without discussing the meaning of the clause declared that it was not binding on the French courts, because "an international convention cannot prevail over the contrary provisions of a municipal statute," and because the clause had been violated by Germany. See text of the decision in 43 Clunet, pp. 1303 ff.

paragraph was intended to make particularly forbidden by the solemn contract of all the States which ratified the Hague Convention of 1907. According to eminent jurists, the occupying military power is forbidden, as a general rule, to vary or suspend laws affecting property and private personal relations.[29] This article 23(h) has now enacted that, whatever else the occupying military power may order in the territory of the enemy which it domiciles, it shall not henceforth declare that the right of the subjects of the enemy to institute legal proceedings in the courts of that territory is abolished, suspended, or inadmissible. If this be its true force, the enactment as an international compact is not only of high value, but it has been inserted quite naturally and appositively in the position in the section and chapter of the Annex to the convention which it occupies.

The court then referred to the fact that

On the eve of the outbreak of the war, the German Ambassador in London addressed a communication to the Foreign Office to this effect: "In view of the rule of English law, the German Government will suspend the enforcement of any British demands against Germans unless the Imperial Government receives within twenty-four hours an undertaking as to the continued enforceability of German demands against Englishmen." No arrangement, said the court, was arrived at. We refer to these two incidents not because either of them can affect our judgment on the question of the interpretation of Article 23(h), but because it is right that it should be made quite clear to everyone that as early as the spring of 1911 the view of the British Government as to its true interpretation was made public to the world, and that the situation was perfectly well understood by the German Government.[30]

*Right to Sue as Plaintiffs Affirmed.*—The decision in *Porter* v. *Freudenberg,* however, involved only the interpretation of a clause in the Hague convention. It did not affirm that the British courts were in fact closed to enemy aliens under all circumstances. There were at the time three classes of such persons in England: (1) prisoners of war in the strict sense of the term; (2) prisoners of war in a wider sense including those who were residents or who were temporarily sojourning there at the beginning of the war and who had been imprisoned for one reason or another, and (3) interned

[29] Here he quoted Hall, International Law, 6th ed., p. 465.

[30] A South African Court adopted the same view of the meaning of the article. *Labuschagne* v. *Maarburger*, So. Afr. L. R. (1915), Cape 423.

civilians. The Home Secretary stated in the House of Commons on November 26, 1914, that although all three classes were prisoners of war, the third class were in a different position from those belonging to the other two classes.[31] They were voluntarily in England by license of the Crown and were entitled to the protection of the law even though they were prisoners of war. They belonged to the category of persons referred to in the case of *Wells* v. *Williams* as being under the protection of the Crown and were therefore entitled to bring actions in the courts. On the basis of this distinction the Chancery Division in October, 1914, ruled that a Hungarian princess residing in England during the war and having properly registered in accordance with the aliens restrictions act was, although an enemy subject, entitled to bring an action for an injunction to restrain the defendant from continuing to publish certain libelous matter against her.

After adverting to the fact that there appeared to be a general impression that enemy aliens were not entitled to any relief at law in the courts of the country, Mr. Justice Sargent stated that the effect of registration was equivalent to a license to remain in the country; in fact it was a command to remain there. The law, he declared, had been correctly stated by Hall,[32] who says:

> When persons are allowed to remain either for a specified time after the commencement of the war or during good behavior they are exonerated from the liabilities of enemies for such time as they, in fact stay as they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own country or other enemy vessels with the enemy country.
>
> Inasmuch, therefore, as the plaintiff is coming to insist on a right which is individual to herself, she has, in my opinion, by virtue of her registration and by virtue of the permission thereby granted her to reside in this country a clear right to enforce that right in the courts of this country, notwithstanding the existence of the state of war.[33]

[31] Interned Alien Enemies, *Law Quarterly Review*, April, 1915, p. 162.

[32] International Law, 6th ed., p. 388.

[33] *Princess Thurn and Taxis* v. *Moffitt*, 1 ch. 58 (1915). The Irish and Scotch Courts adopted this view in several cases. See Trotter, *op. cit.*, pp. 122-124. So did the courts of Canada. See especially the case of *Viola* v. *McKenzie, Mann & Co.* (1915), 24 Quebec B. R. 31; others are cited by Borchard in *Yale Law Journal*, 27:107, and by Huberich, *op. cit.*, p. 200.

In the above-mentioned case the plaintiff was not an interned prisoner of war. Her position was therefore somewhat different from that of the plaintiff in the case of *Schaffenius* v. *Goldberg*[34] where the plaintiff was an interned civilian prisoner who had long resided in England and who had duly registered under the Aliens Restriction Act. In the latter case the question was presented to the Chancery Division whether the internment as a prisoner, of an enemy alien, operated to revoke the license to remain in the country—such license being implied by registration under the Aliens Restriction Act—and therefore to deprive him of the protection of the Crown. The court held that internment had no such effect, but on the contrary, rather strengthened the license; consequently the plaintiff was entitled to bring an action to enforce a contract entered into between him and a British subject after the internment of the plaintiff.[35] After adverting to the recent decision in the case of the *Duchess of Sutherland*[36] where it was held that an enemy alien resident in an allied or neutral country could sue in a British court the Court of Appeal said it followed, *a fortiori,* that such a person, if resident in England, and especially if interned, could equally maintain an action. "In a case like the present," the Court said, "where the plaintiff is effectually prevented from leaving this country, there is no reason of state or public policy why the principle just alluded to should not be given full effect. The case would be quite different if the plaintiff were to remove to enemy territory. He would then become an enemy in the full sense, no longer able for the duration of the war to enforce his civil rights, or sue, or proceed in the civil courts of the realm."[37]

The argument advanced by the defendant that internment was equivalent to the revocation of the license to remain, which was implied by the requirement of registration, Mr. Justice Younger held

[34] 1 K. B. 184 (1916), and *Solicitors Journal and Weekly Reporter*, 60:8.

[35] Compare the case of *Nordman* v. *Rayner*, 33 T. L. R. 87 (1916), which was also a case of "innocent" internment.

[36] 31 L. T. R. 248.

[37] The case would also probably have been different if it had not been a case of "innocent" internment, that is, if the plaintiff had been interned on account of some overt hostile act. Compare McNair, Alien Enemy Litigants, 34 *Law Quarterly Review*, 135.

to be inadmissible. He then referred to the decision in the case of the *Princess Thurn and Taxis* v. *Moffitt* where it was said that the permission to remain really amounted to a command not to depart without special leave, from which it was clear more than ever that internment was merely a further security that the command would be obeyed. In that case the plaintiff was not interned as a prisoner of war, though she was registered. If she was allowed to bring an action there was no reason for denying the privilege to an interned enemy alien. In short, internment did not alter the position of a registered alien. The danger of allowing an enemy alien to sue would, if anything, be less when he was interned than if left at large.

It is true in a very real sense, said the court, that the plaintiff is a prisoner of war,[38] but it would indeed be strange if that circumstance, without more, should have the extraordinary effect upon his rights attributed to it. It is common knowledge amongst us that the internment of a civilian enemy does not necessarily connote any overt hostile attitude on his part.[39]

*Effect of the Decision.*—The decision in *Schaffenius* v. *Goldberg* marked a very important relaxation from the rigor of the old rule and was strongly approved by fair-minded persons in England.[40] It was in accord with the most elementary notions of justice and humanity. So long as enemy subjects were allowed to remain in England it was necessary to allow them legal means of enforcing the payment of debts due them, to say nothing of other contracts. When they were interned in concentration camps and their property and business placed in the hands of custodians and controllers it would have been a gross hardship to deprive them of the legal remedy of obtaining the necessary means of subsistence. In consequence of the internment of practically the entire enemy alien population the effect of the decision was to open the English courts to the great mass

[38] The Divisional Court in the Case of *Rex* v. *Liebmann* had held that the internment of a civilian of enemy nationality made him a prisoner of war.

[39] Upon appeal the view and reasoning of the Divisional Court were affirmed by the Court of Appeals.

[40] See, e.g., the *London Solicitors Journal and Weekly Reporter*, Vol. 59, p. 761. See also the favorable comment by a French writer, in 43 Clunet, pp. 435 ff.

of enemy subjects left in England. The rule thus laid down was followed by the courts in other similar cases.[41] With a few exceptions the only enemy aliens to whom the courts were closed were those residing in enemy territory.[42] The Court of Appeal even held that a company registered in England, even if all its shareholders except one were enemy subjects resident in enemy territory, could maintain an action in an English court, but this holding was overruled by the House of Lords.[43]

Nevertheless, the right of action thus recognized was contested by high legal authority. It was asserted, for example, that the case of *Wells* v. *Williams,* upon which the recent decisions were mainly based, was not strictly an analogous case. That case involved the right of a French subject who came into England during the war between England and France without a safe conduct. Yet he came with the permission of the King and with the promise of his protection, whereas in the recent cases the plaintiffs had not been invited to come and no express promise of protection had been made. If there was any such promise it existed only by the broadest implication.

It was also pointed out that the decisions were not in accord with the later cases of *Alciator* v. *Smith* (1812) and of *Alcinous* v. *Nigreu* (1854) in both of which enemy aliens were denied the right to sue in British courts. At the outbreak of the wars of 1812 and 1854 there

[41] For example, in the case of *Gow & Co.* v. *The Bank of Scotland.* See the *Law Times* of October 2, 1915. Other cases are cited in Huberich, p. 209. In the case of *Schaffenius* v. *Goldberg* the contract in question was entered into *after* the outbreak of the war. In the case of *Mayer* v. *Finksibler* it was held that a contract entered into between two parties *before* the outbreak of the war, one of whom was subsequently interned as an enemy alien, was unaffected, and the latter's right to sue for its enforcement remained. Picciotto, article cited, p. 169.

[42] Persons voluntarily residing in enemy territory were not allowed to bring actions in the English courts. See the case of *Scotland* v. *South African Territories, Ltd., Law Times,* 142:366 (1917).

[43] *Continental Tyre & Rubber Co.* v. *Daimler.* 1 K. B. 893 and 2 A. C. 307 (1916). The High Court of Australia held, in the case of *Welsbach Light Co.* v. *Commonwealth,* 22 Com. L. R. 268 (1916), that domestic corporations controlled by enemy directors or shareholders were enemies and could not therefore sue; but in *Amorduct Mfg. Co.* v. *Defries & Co.,* 31 T. L. R. 69 (1914), it was held that a company registered in England might sue, although nearly all of the shares were held by enemy aliens.

had been no invitation to enemy aliens to remain as there had been in 1696 upon the outbreak of the war with France. Nevertheless in the *Alciator* case the plaintiff had been under a régime of registration similar to that of the recent war. But the court held that the fact of registration was not to be regarded as a license.[44]

*Writ of Habeas Corpus Denied to Interned Enemy Aliens.*—The question whether a writ of *habeas corpus* could issue to an interned German civilian was raised by the case of *Rex* v. *Supt. of Vine Street Police Station ex parte Liebmann.*[45] The Crown contended that the applicant being a prisoner of war the writ could not issue. The court held, on the authority of *ex parte Weber,*[46] that he was an enemy alien, and having regard to the fact that spying had become the hall mark of German kultur, a person of German origin who had obtained a discharge from his German nationality but resident in the United Kingdom, who in the opinion of the executive is a person hostile thereto and is on that account interned may properly be described as a prisoner and not therefore entitled to the writ.

Turning to the question as to whether the applicant was in the position of a prisoner of war, Mr. Justice Bailhache said:

It is at first sight somewhat startling to be told that a civilian resident of this country, interned by the police on the instructions of the Home Secretary, can be accurately described as a prisoner of war. One generally understands by a prisoner of war a person captured during warlike operations by the naval or military forces of the Crown, or, perhaps, a civilian arrested as a spy. I think, however, that the courts are entitled to take judicial notice of certain notorious facts which may be summarized thus: There are a large number of German subjects in this country. This war is not

[44] Compare an editorial in the *Law Magazine and Review*, for July, 1915, pp. 215 ff., where the recent decisions that an enemy alien who has not been expelled but is subject to internment or registration is in England by license and therefore entitled to the privilege of suing, is severely criticised. See also Baty & Morgan, War; Its Conduct and Legal Results, pp. 254, 269.

[45] 1 K. B. 268 (1916).

[46] 1 K. B. 280 (1916). In this case an application for a writ of *habeas corpus* by a German residing in England who claimed that he had lost his German nationality by long absence and who was not therefore an enemy alien, was denied on the ground that he had not produced sufficient proof of his loss of nationality. This decision was affirmed by the Court of Appeal and later by the House of Lords, 1 A. C. 421 (1916).

being carried on by naval and military forces only. Reports, rumors, intrigues, play a large part. Methods of communication with the enemy have been entirely altered and largely used. I need only to refer to wireless telegraphy, signalling by lights, and the employment, on a scale hitherto unknown, of carrier pigeons. Spying has become the hall mark of German kultur. In these circumstances a German civilian in this country may be a danger in promoting unrest, suspicion, reports of victory, in communicating intelligence, in assisting the movement of submarines and Zeppelins, a far greater danger, indeed, than a German soldier or sailor.

In a contest with people who consider that the acceptance of hospitality connotes no obligation and that no blow can be foul, it would, I think, be idle to expect the executive to wait for proof of an overt act or for evidence of an evil intent. In my opinion this court is entitled to take judicial cognizance of these matters, and in a question so greatly involving the security of the realm to say that where the Crown in the exercise of its undoubted right and duty to guard the safety of all represents to this court that it has become necessary to restrain the liberty of an alien enemy within the kingdom, and accordingly within the terms of the notice served in this case, to intern such alien enemy as a prisoner of war, he must be regarded for the purpose of a writ of *habeas corpus* as a prisoner of war.

Inasmuch as practically the entire enemy alien population was interned the effect of this decision was to deprive all enemy aliens with a few exceptions of the benefit of the writ.

*Right of a Firm Domiciled in Germany to Sue Denied.*—In the case of *Re Mehelin Hemcoth, Limited,* a firm composed of three partners, all Germans resident and domiciled in Germany and having its principal place of business in Germany, but having a branch house in Manchester, the question was raised as to the right of an enemy company to bring an action in a British court to recover for goods sold and delivered to British subjects. The plaintiffs pleaded that since their Manchester business was a branch house they were entitled, under the proclamation of September 9, 1914, to bring the action even though they were enemy subjects. Without deciding whether a license issued to an enemy branch house to trade included the right to sue, the court held that there was nothing in the proclamation which enabled the plaintiffs to recover, where otherwise as alien enemies they could not do so. The proclamation, it was said, did not enable an alien enemy to sue in respect of obligations incurred be-

fore the war and they were not suing in respect of any transactions authorized by the proclamation.[47]

*Right of Enemy Aliens to Defend Actions Against Them.*—Regarding the right of an enemy subject to appear and defend an action brought against him by a British subject, there appears to have been little or no judicial authority before the recent war.[48] The right of an enemy to defend an action had, however, been affirmed by the United States Supreme Court in the *McVeigh* case.[49] The question was first raised and disposed of during the recent war in the case of *Robinson & Company* v. *Continental Insurance Company of Mannheim,* decided in 1915.[50] The pleadings in the suit had been concluded before the outbreak of the war and after the beginning of hostilities it was contended on behalf of the defendants that under the common law all actions between British subjects and enemy aliens were suspended by the outbreak of war and that consequently an enemy alien could not be heard as a defendant. Mr. Justice Bailhache affirmed, however, that this contention was at variance with the decision of Lord Erskine in *ex parte Boussmaker*[51] where it was held that an enemy alien could appear in bankruptcy proceedings to protect his right to a dividend. There was abundant authority, he said, for the view that an enemy alien could not appear as a plaintiff if objection was made by the defendant, but it did not follow that the converse was true. There were good reasons, he went on to say,

[47] *Law Times,* May 8, 1915, p. 25.

[48] Schuster, Effect of War and Moratorium on Commercial Transactions, p. 13. In actions against enemy aliens by British subjects for the enforcement of contracts the defense of alienage on the part of the defendant has long been regarded with disfavor by the English courts even when the suit involved intercourse with the enemy. Lord Kenyon pronounced it an "odious plea" and declared that whoever sets it up must produce the clearest evidence that the defendant is by nationality or domicile an enemy. A case involving this question during the recent war was that of *Schmitz* v. *van der Veen* (K. B. Div. 112, T. L. R. 99, 1915), where the court overruled the plea of the defendant that being an enemy alien he could not be made the object of a suit at the instance of a British subject. The plaintiff, it was held, was entitled to recover on a contract made before the war, and there was no common law rule which suspended such contracts. So in the case of *Halsey* v. *Lowenfeld,* the King's Bench Division held in 1916 that an action might be maintained against an enemy subject for arrears of rent accruing after the outbreak of war. 1 K. B. 143 (1916).

[49] 11 Wall. 259. [50] 1 K. B. 155 (1915). [51] 13 Ves. 71 (1806).

why an enemy alien might be denied the right to appear as a plaintiff to enforce rights which but for the war he would be entitled to enforce for his own advantage and to the detriment of English subjects, but "to hold that a [British] subject's right of suit is suspended against an enemy alien would defeat the object and reason of the suspending rule; in short, the effect would be to convert that which during war is a disability, imposed upon an enemy alien because of his hostile character, into a relief from the discharge of his liabilities to British subjects. To allow an action against an enemy alien and to refuse to allow him to appear and defend himself would be opposed to the fundamental principles of justice.[52]

Justice Bailhache said:

Prima facie there seems no possible reason why our law should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects. The rule of law suspending the alien enemy's right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy.

Once the conclusion is reached that the alien enemy can be sued, it follows that he can appear and be heard in his defense and may take all such steps as may be deemed necessary for the proper presentment of his defense. If he is brought at the suit of a party before a court of justice he must have the right of submitting his answer to the court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the King's courts in the administration of justice.

Turning then to the question as to whether an enemy alien who in a lower court may appeal to a higher tribunal, Mr. Justice Bailhache said:

Equally it seems to result that, when sued, if judgment proceed against him, the appellate courts are as much open to him as to any other defendant. It is true that he is the person who may be said in one sense to initiate the proceedings in the appellate court by

[52] There is no rule of common law, said the *London Solicitors Journal and Weekly Reporter* (October 23, 1914, p. 7), which suspends an action in which an alien is a defendant and no rule of common law which prohibits him from appearing and conducting his defense. "Whatever may be the extent of the disability of an alien enemy to sue in the courts of a hostile country," said the *London Times* of October 17, 1914, "it is clear that he is liable to be sued, and this carries with it the right to use all means and appliances of defense."

giving the notice of appeal, which is the first necessary step to bring the case before the court, but he is entitled to have his case decided according to law, and if the judge in one of the King's courts has erroneously adjudicated upon it, he is entitled to have recourse to another and an appellate court to have the error rectified. Once he is cited to appear he is entitled to the same opportunities of challenging the correctness of the decision of the judge of first instance or other tribunal as any other defendant.[53]

The right of an alien enemy to appear as a defendant was affirmed by the court of appeal in the case of *Porter* v. *Freudenberg*.[54] This was a case in which a British subject brought an action against a German subject to recover rent due on a lease made in 1903. The defendant resided in Berlin but had a branch house in London. "To allow an alien enemy to sue or proceed during war in the civil courts of the King," said the court, "would be, as we have seen, to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during the war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy."[55]

[53] Compare also the case of *Ingle* v. *Mannheim Ins. Co.*, 1 K. B. 227 (1915), and the comment in the *Solicitors Journal and Weekly Reporter*, November 7, 1914. In this case the King's Bench Division held that the Trading with the Enemy proclamation of October 8, 1914, did not prevent a British subject from receiving money from or suing an enemy alien where the right to be paid or to sue had accrued before the defendant had acquired the status of an enemy alien.

[54] *Times Law Rep.*, Vol. 112, p. 313; 1 K. B. 857 (1915) and *Solicitors Journal and Weekly Reporter*, January 23, 1915, p. 216.

[55] Schuster (Effect of War and Moratorium on Commercial Transactions, p. 3) calls attention to one possible practical difficulty which enemy defendants had to face in England, namely the difficulty of obtaining the services of solicitors owing to the fact that there was some doubt as to whether an English solicitor might lawfully defend the case of an enemy alien. The suggestion was made during the prize court hearing in the case of the *Möwe* that perhaps solicitors were debarred by the Trading with the Enemy Act from defending enemy aliens. Clause 5 of the Act of 1914 forbade British subjects from entering into any commercial, financial or other contracts or obligations with an enemy alien. But the *Solicitors Journal and Weekly Reporter* of November 7, 1914 (p. 35), expressed the view that the prohibition in question was not intended to apply to professional relationships and therefore the hiring of solicitors was no more illegal than the employment of a physician. "We have by this time," said the editor, "advanced too far to say that an alien enemy is entirely without rights unless that is laid down absolutely, unless, that is, we relapse

The rule laid down in the above-mentioned cases that an enemy alien who was sued by a British subject was entitled to appear and defend the action was, however, the subject of criticism by high English authority, on the ground that it was inconsistent with the old doctrine of the suspension and cancellation of contracts, as well as contrary to the reason on which non-intercourse with the enemy is forbidden.[56] But it appears to be based on good sense and is in harmony with elementary notions of justice.[57]

into the *ex lege* doctrine. Aliens must be entitled to legal assistance and we incline to think that the legal profession would fail of its boasted traditions if it refused assistance." In fact, the difficulty appears not to have been serious, for members of the English bar freely gave advice to enemy aliens.

A more serious practical difficulty in suing an enemy was the problem of serving process on him. The English courts met the difficulty to some extent by allowing substituted service of notices on agents in England or Holland where there was reason to believe that knowledge of the proceedings would be transmitted to the principal. Lord Justice Scrutton in 34 *Law Quarterly Review*, 124.

[56] For example, by Baty and Morgan, War: Its Conduct and Legal Results, p. 288. These authors as well as others contend that the authority of the U. S. Supreme Court in the *McVeigh* case is not applicable in an international war. Moreover, they add, the opinion of the court in that case, so far as it related to the right of an enemy alien to be sued, was *obiter dicta*, since the defendant was not in fact an enemy alien, the parties being enemies only in a technical sense. Both were in fact citizens of the United States and could not be "kept out of the courts of the United States." The *London Solicitors Journal and Weekly Reporter* of January 23, 1915 (p. 212), criticised the decision in *Robinson* v. *Continental Insurance Co. of Mannheim* as being "a singular mixture of ancient law and modern ideas" because it held that an enemy alien cannot sue unless he is resident in England and registered or interned or unless he turns himself into an English company, although he may be sued and subject to an exception, may take an appeal to a higher court. Mr. E. G. Roscoe in a letter of October 27, 1914, to the editor of the *Solicitors Journal* (59:23) ventured the opinion that the ruling in this case was inconsistent with the opinion of Sir William Scott in the case of the *Hoop*. "I do not say," Mr. Roscoe adds, "that the principles laid down by Mr. Justice Bailhache are not eminently desirable, but are they actually in accordance with the principles of English law as hitherto laid down?" To this communication the editor replied that Sir William Scott was dealing with the right of an enemy alien to sue as a plaintiff and not as a defendant, and therefore his remarks regarding the incapacity to sue could not be interpreted as denying the right of defense (*Ibid.*, October 31, 1914, p. 20).

[57] Compare the Views of Picciotto, article cited, p. 173, and of Lord Justice Scrutton, The War and the Law, 34 *Law Quarterly Review*, 123.

*Practice of the Prize Court in Respect to Enemy Claimants.*— The question as to the right of a non-resident enemy subject to appear as a claimant in prize proceedings and to defend his claim was passed upon by the President of the British prize court in the case of the *Möwe* decided on November 9, 1914.[58] Sir Samuel Evans held that although no legal right to appear and defend existed, he would, in the exercise of the power which belonged to the court to adopt rules of practice, allow enemy claimants to appear and defend any right claimed under the Hague Convention respecting the treatment of enemy merchant vessels found in port at the outbreak of the war. Counsel for the claimants argued that they were not plaintiffs claiming the restitution of the ship, but defendants seeking to avoid condemnation and they cited numerous authorities, English and American, in support of the right of an enemy subject to appear in court as a defendant.[59]

Sir Samuel Evans reviewed at length the practice and jurisprudence during the Crimean, Spanish-American and Russo-Japanese wars, in all of which enemy claimants were allowed to appear in prize proceedings but only because there were special circumstances which *pro hac vice* suspended their enemy character for the purpose of suing.[60] In the present case, however, there was no coming *pro hac*

[58] Trehern, British and Colonial Prize Cases, Vol. I, pp. 60 ff. The question had already been raised in the cases of the *Chili* and the *Marie Glaeser*, but a ruling on the merits of the question was not necessary to the judgment.

[59] Among others, the English cases of *Janson* v. *Dreifontein Consolidated Mines Company* (1902), *Robinson* v. *Continental Insurance Company of Mannheim* (1914), and the American case of *McVeigh* v. *the United States*, 11 Wall. 259.

In the argument in the *Möwe* case, both counsel for the claimant and the Attorney General argued in favor of the right of an enemy alien claimant to appear and defend his claim. The Attorney General even went to the length of suggesting that in case the existing law did not allow such a right, the Government would be prepared to issue an order in council expressly authorizing it.

[60] Among the American cases cited in which enemy persons were allowed to appear in prize courts and assert their claims were the *Pedro*, 157 U. S. 354 (1899), the *Guido*, 175 U. S. 382 (1899), the *Buena Ventura*, 175 U. S. 384 (1899), the *Panama*, 176 U. S. 535 (1900), and the *Paquette Habana*, 175 U. S. 677 (1900). Among the Japanese cases were the *Tetartos*, 1909, Hurst & Bray, Russian and Japanese prize cases (Vol. I, p. 166), the *Ekaterinoslav*, 1905

*vice* within the King's peace, no suspension of the hostile character and he was satisfied that neither Lord Stowell nor Dr. Lushington would have allowed an enemy owner to appear to assert a claim in a case similar to this.

Nevertheless, permission to an enemy to sue was not a matter of international law but of court practice and he thought the prize court had the inherent power to regulate its own practice unless prohibited by law. Lord Stowell did so from time to time and his right was not questioned.

"A merchant," said Sir Samuel, "who is a citizen of an enemy country would not unnaturally expect that when the state to which he belongs, and other states with which it may unhappily be at war, have bound themselves by formal and solemn conventions dealing with a state of war, like those formulated at the Hague in 1907, he should have the benefit of the provisions of such international compacts. He might also naturally expect that he would be heard, in cases where his property or interests were affected, as to the effect and results of such compacts upon his individual position."

In view of these considerations and in order "to induce and justify a conviction of fairness, as well as to promote just and right decisions," Sir Samuel announced that he would direct that whenever an enemy subject conceived that he was entitled to any protection, privilege or relief under any of the Hague Conventions of 1907 he would be allowed to appear as a claimant and argue his claim before the court.[61]

(*ibid.*, II, 1), the *Mukden*, 1905 (II, 12), the *Rossia*, 1905 (II, 39), the *Argun*, 1905 (II, 46), the *Manchuria* (II, 52), the *Lesnik* (II, 92), the *Kobik* (II, 95), the *Thalia* (II, 116), and the *Oriel* (II, 534).

[61] The British prize court in Egypt adopted the same rule in the case of the *Gutenfels* (Trehern's Cases I, 102). Judge Cator in his opinion declared the old rule to be a "barbarous one which runs counter to all sense of natural justice and it seems strange that it should be found embodied in the practice of any English prize court. If it is right that we should insist upon hearing a man in his own defense in those courts where the parties of one nation, and the judge may be expected to be quite indifferent as to which suitor should succeed, it seems to me to be still more important that the enemy party should be heard in a prize court when the crown claims condemnation of his ship and the judge's sympathies must be supposed to be in favor of his own country. It is much to be regretted that this question did not occupy the attention of

It will be seen that the doctrine here laid down by the British prize courts is theoretically in accord with the old rule, for it denies the legal right of an enemy subject to appear as a claimant and defend his claim to property in the custody of the prize court. The concession here granted was in fact limited to those only who claimed rights under the Hague Conventions, and even it was accorded as an act of grace on the part of the court and might be withdrawn at any time in the discretion of the judge. The decision therefore did not go to the length to which the King's Bench division and the Court of Appeal went in the cases referred to above. It is submitted that the prize court might have gone further, overruled the ancient doctrine and laid down the broad principle that enemy subjects have a right to be heard not only when they assert claims under the Hague Convention but also for any other reason.[62]

*Legislation and Practice in the United States.*—Section 7, paragraph b, of the Trading with the Enemy Act of October 6, 1917, declared that nothing in the said Act should be deemed to authorize the prosecution of any suit or action at law or in equity in any court "within the United States" by an enemy or an ally of an enemy prior to the end of the war, provided that such person if licensed to do business under the act might prosecute any suit arising solely out of such business transacted in the United States and any enemy or ally of an enemy might defend by counsel any suit or action brought against him. Receipt of notice from the President to the effect that he had reasonable ground to believe that any person was an enemy or an ally of an enemy should be *prima facia* defense to any one re-

the Hague Conference. I have little doubt what the opinion of the Conference would have been, and feel sure that most of the delegates would have been surprised that in a British Prize Court the owner of captured property has no right to present his case against the Crown if he be an alien enemy."

Speaking of the old practice Judge Cator said: "The fact is, the rule is a bad rule, much more to be honored in the breach than in the observance; and if we must acknowledge ourselves to be so far fettered by the dead hand of outworn precedent as to recognize its continued existence, I am, at any rate, determined to permit all such breaches of it as my sense of equity and fair dealing towards the enemy may demand."

62 It is refreshing to find the London *Solicitors Journal and Weekly Reporter* advocating this view. See the issue of November 14, 1914.

ceiving the same, in any suit or action brought by such person and based on failure to complete or perform since the beginning any contract or other obligation. By section 10, paragraph g, enemy subjects were empowered to bring and prosecute suits in equity against any person other than licensees to enjoin infringements of patents, trade marks, prints, labels and copyrights in the United States, owned or controlled by such persons, provided that no final judgment or decree might be entered in their favor except after thirty days notice to the alien property custodian. The full import of Section 7, paragraph b, is not quite clear. It conferred upon enemy subjects who had licenses to do business in the United States the right to sue in respect to issues arising out of such business but it conferred no such right upon other enemy persons, although it did not expressly prohibit them from suing. Nevertheless, as they are prohibited by a common law rule from bringing actions, express authority to do so would probably be necessary. The section referred to speaks of "any court within the United States," but it may be doubted whether Congress may prohibit an enemy alien from suing in a state court. Two points, however, are clear, namely, that enemy subjects might defend actions brought against them but that they could not bring actions in respect to unperformed contracts against any one in the United States. Several cases involving the right of Germans to sue in the state courts arose in 1917. In the case of *Posselt* v. *D'Espard*[63] a court of Chancery in New Jersey declined to stay a suit brought by a person erroneously assumed to be a German subject, resident in the United States, and the manager of a corporation, a majority of the stock of which was owned by a German corporation for the preservation of the rights of the complainants as stockholders in a New Jersey Corporation.[64]

[63] 100 Atlantic Reporter, 893 (1917).

[64] The court said, *inter alia*, "The solution of the problem now before me, I think, is found in the President's message to Congress, which in view of the nature of its reception by Congress and the action of Congress under it has become the voice of the country; and the President's proclamation declaring a state of war and defining rights of residents, an official act under authority of Congress. German residents who comply with needful regulations and who properly conduct themselves are assured that they will be undisturbed in the

The New York Supreme Court declined to follow the decision of the English House of Lords in the Continental Tyre & Rubber case and held that a New Jersey corporation, a large majority of the shares of which were owned by a German corporation and a German subject resident in Germany, was an entity separate and distinct from its stockholders and was therefore entitled to maintain an action. After reviewing the American cases at length the court reached the conclusion that the decisions were practically unanimous in regarding a corporation as a thing apart from its corporators and that the rule laid down by the House of Lords was not in accord with American precedents. Therefore, a corporation, created under the laws of any one of the States could not be deprived of access to the courts for the protection of its legal rights, notwithstanding the fact that a large majority of the individual stockholders were enemy subjects resident in enemy territory.[65]

In a suit brought by German subjects resident in Germany to recover money due them by an American firm, before the declaration of war, however, a United States District Court directed the proceedings to be suspended rather than dismissed, until the restoration of peace.[66]

A motion to dismiss a complaint filed by a resident enemy or to stay proceedings was denied by the Supreme Court of New York. There was nothing in the Trading with the Enemy Act, said the Court, which was applicable to the case and there was no evidence that it was the intention of Congress or the President to deny to the plaintiff the exercise of the same civil rights enjoyed by neutral aliens. The Court added:

> With only a few exceptions the nations of all the earth both advocate and practice many ameliorations of the acerbities of war. In that endeavor this nation is not backward. No limitation is

peaceful pursuit of their lives and occupations and be accorded the consideration due all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States. To shut the door of the court in the face of an alien enemy resident here would be a distinct violation of not only the spirit but the letter of this proclamation."

[65] *Fritz Schultz, Jr.*, v. *Raimes & Co.* (1917) 166 N. Y. supp. 567. The leading Federal case upon which the court relied was *Bank of U. S.* v. *Deveaux*, 5 Cranch U. S. 61.

[66] *Plettenberg, Holthaus & Company*, v. *Kalmon & Company*, 241 Fed. Rep. 605.

placed upon the freedom of resident subjects of a foreign State with which we are at war, unless that limitation is deemed necessary to withhold from that enemy the aid or comfort which may advance his cause. Mere technical or arbitrary rules are neither enacted, nor, when found in ancient usage, enforced. How could our own plans be served or those of Germany defeated or impaired by closing against the plaintiff the doors of our courts? While I should be inclined to hold that the plaintiff is entitled to maintain her action on the ground that within the purview of the Trading with the Enemy Act she is not an alien enemy engaged in trade subject to suspension by the Federal Government, I prefer to deny the motion on the broad ground that the resident subjects of an enemy nation are entitled to invoke the process of our courts so long as they are guilty of no act inconsistent with the temporary allegiance which they hold for this Government.[67]

There is a large amount of American case law relative to the right of enemy aliens to sue and this may be briefly summarized as follows:[68] An enemy subject cannot bring an action in an American court during the continuance of war nor prosecute one instituted before its commencement, but this disability applies only to a non-resident enemy and not to those who are permitted to enter or remain in the United States during the war. "A lawful residence implies protection and a capacity to sue and be sued."[69] Some state courts have held that where an action has been commenced before the outbreak of war the proceedings are only suspended, whereas a suit commenced after the outbreak of war will be dismissed; others have held that where the plaintiffs become enemy aliens subsequent to the institution of the suit the action should be dismissed without prejudice. The American courts have uniformly held that enemy aliens may be made defendants at the instance of American citizens who are seek-

[67] *Arndt-Ober* v. *Metropolitan Opera Co.*, 58 *N. Y. Law Jour.* 1347 (1918). See also the case of *Speidel* v. *N. Barstow Co.*, 243 N. Y., 621 (1917).

[68] This summary is made mainly from an article entitled "Alien Enemies as Litigants," published in *Case and Comment* for June, 1917, pp. 93 ff. This article appears to contain an exhaustive examination of the cases decided by the American courts. See also Borchard, Right of Alien Enemies to Sue, *Yale Law Journal*, 27:105; Huberich, On Trading with the Enemy, pp. 188 ff., and 194 ff., and Mitchell, in the *Maine Law Review*, November, 1917.

[69] *Clarke* v. *Morey*, 10 Johns, 69 (1813); and *Norddeutsche Ins. Co.* v. *Dudley*, *N. Y. Law Jour.*, January 11, 1918.

ing to protect their property and enforce their rights but where an enemy alien is sued he is entitled to appear by attorney and be heard in his defense.[70] But a non-resident enemy alien cannot prosecute a counter claim.[71]

### FRENCH LAW AND PRACTICE.

*Early Opinion and Practice.*—As to the right of enemy subjects to sue either as plaintiffs or defendants in the courts of France there appears to have been little judicial authority or positive legislation prior to the recent war. There was, however, a decision of the *parlement* of Douai in 1704 to the effect that a subject of an enemy power could not sue a subject of the King of France, when the latter had by decrees prohibited all relations between his subjects and those of the enemy country. There also appears to have been an "act of government" in 1803 and a decision of the Court of Cassation in 1806 affirming this principle.[72]

*French Legislation of 1914 and 1915.*—During the recent war no legislation expressly denying the right to sue was enacted by the French parliament or proclaimed by decree of the government, but those who adopt the view that the right to sue does not exist, either rely upon the legislation and jurisprudence of the first Empire, referred to above, which they say has never been repealed, or upon the terms of the decree of September 27, 1914, prohibiting commercial relations with the enemy and the act of parliament of April 4, 1915, which prescribes penalties for violation of the decree. Article 2 of the decree referred to declared null and void as being contrary to public policy (*l'ordre public*), every act or contract performed or entered into either in French territory or in a French protectorate,

[70] As was pointed out above this rule was adopted by the United States Supreme Court in the case of *McVeigh* v. *the United States*, 11 Wall. 259 (1870), and it has been followed by the State courts in many cases. See the cases cited in an article in 3 *Va. Law Register*, 1917, p. 102, n. 45.

[71] This was also the decision of the King's Bench Division in the case of *Robinson* v. *Continental Ins. Co.*, 31 *Times Law Reports* 20 (1915) referred to above.

[72] On the French practice and doctrine, see two valuable articles by Professor Jules Valéry, of Montpellier, in the *Rev. Gén. de Droit Int. Pub.*, 1916, pp. 379 ff. and in Clunet's *Journal de Droit Int. Privé*, 1915, pp. 1009 ff.

with subjects of the German or Austro-Hungarian Empires or with persons residing therein. Article 3 prohibited and declared to be null as contrary to public policy, the execution for the benefit of the subjects of the said empires or persons residing therein, of pecuniary or other obligations resulting from every act or contract done or entered into in French territory by every person prior to August 4, in the case of German subjects and prior to August 13 in case of Austro-Hungarian subjects. By a decree of November 7, 1915, the terms of the decree of September 27 were extended to apply to relations with the subjects of Bulgaria and persons residing therein.

*Denial of the Right to Sue.*—The above-mentioned prohibition in respect to contracts with enemy subjects, it was argued by the adversaries of the right to sue, applied not only to relations of a pecuniary or commercial character but also to civil contracts and relations such as are necessarily implied in judicial proceedings between Frenchmen and enemy subjects. It followed therefore that enemy subjects were prohibited from instituting or prosecuting actions in the courts of France. This was the view adopted by a number of French jurists[73] and by the French courts in several cases[74] one of the most reactionary decisions in which the right to sue was denied

[73] For example by Professor Valéry in the articles cited above; by M. Reulos, *Manuel des Séquestres*, p. 12, n. 1, and p. 214; by M. Courtois, in Clunet's *Journal*, T. 42, p. 509; by M. Troimaux, *Séquestres et Séquestrés*, pp. 163 ff., and by M. Théry in Clunet, T. 44, pp. 480 ff. Professor Valéry affirms that the judicial disability of enemy aliens was a rule of the Roman law and is equally the established doctrine of French public law. Rousseau's theory that war is a contest merely between armed forces, may, he says, have been true before 1914, but the refusal of the Germans to act in harmony with it destroyed whatever force it had acquired. He quotes Portalis and Leuder (Holtzendorff's *Handbuch*, IV, p. 358) in support of the view which he maintains. Valéry, however, appears to have admitted that an enemy subject might defend an action against him.

[74] Among the French courts which refused to admit enemy aliens to sue were the tribunal of Marseilles (June 22, 1915); the tribunal of Commerce of Marseilles (January 5, 1917); of Phillippeville (April 15, 1915) and the tribunal of the Seine (*référé*) May 18, 1916. Nevertheless sequestrators of enemy property could sue for the purpose of protecting the property in their custody. Actions by French creditors for the recovery of debts against sequestrated property could also be brought against the sequestrator, in which case the latter could defend the action.

was that of May 18, 1916, by President Monier of the Tribunal of the Seine (*référé*)[75] who interpreted the prohibition in the decree of September 27 in respect to *actes* and *contrats* with enemy subjects to embrace "judicial" acts such as are involved in retaining counsel and bringing actions in the courts.

Adverting to the contention that under Article 23(h) of the fourth Hague Convention of 1907 enemy subjects are entitled to sue in the courts of France, M. Monier asserted that "an international convention cannot prevail against a subsequently enacted municipal law which modifies its provisions and respect for which is rigorously imposed on every inhabitant of French territory,"[76] the "speculative theories of the law of nations" to the contrary notwithstanding. Furthermore, the above-mentioned provision of the Hague Convention was not binding on France because it had been violated by the German decree of August 7, 1914, which excluded French subjects from suing in the courts of Germany.[77] Not only this, but M. Monier added, the Germans had "cynically and deliberately violated all the rules imposed on belligerents by the various conventions of the Hague"; consequently the subjects of Germany were not entitled to the benefit of the law of nations in general and of the Hague Conventions in particular.[78] Every reason and consideration of law and fact, he concluded, was opposed to opening the courts to Germans; such liberty was in flagrant contradiction with the tendencies of opinion; it would lead in practice to serious inconveniences, possible collusions and fraud and even irreparable injury to the country.

[75] The case of *Wilmoth, Sequestrator* v. *Daude*, Text in Phily, *Jurisprudence Speciale et Législation de la Guerre*, Pt. III, pp. 225 ff., also in Clunet, T. 43, pp. 1303 ff.; see also the case of *Wilmoth, Sequestrator*, v. *Société Gén. Immobiliére*, December 21, 1915. Text in Reulos, pp. 355 ff.

[76] Professor Barthélemy (43 Clunet, 1484) remarks that this doctrine is "calculated to move the hearts of international publicists." M. Barthélemy properly adds that international conventions which have been ratified by France are binding upon all French judges.

[77] But as M. Barthélemy remarks the German prohibition applied only to French citizens domiciled *outside* the Empire and not at all to those resident therein. See also 42 Clunet, 567, and 43 Clunet, p. 1131, on this point.

[78] Compare on this point the more liberal views of Judge Cator, of the British prize court at Alexandria in the case of the *Gutenfels*, quoted above.

That enemy aliens had no *persona standi in judicio* was also the view of the council of the Order of Advocates of the Court of Paris [79] and of the Chamber of Solicitors (*Avoués*) of the tribunal of the Seine.[80]

[79] Resolution adopted November 30, 1915, Text in 43 Clunet, pp. 12 ff.

[80] Reulos, p. 215. One of the arguments advanced in support of the view that enemy aliens have no capacity to bring actions in the courts was that the employment of an attorney would involve the entering into contractual relations between the attorney and the enemy client, which was in effect forbidden by the decree of September 27. Compare Courtois and Valéry in 42 Clunet, pp. 511 and 1009. The resolution of the Council of the Order of Advocates referred to above declared that inasmuch as Germany had prohibited "all relations" with enemy subjects, it was the duty of the French bar to set an example of patriotism by refusing to take the cases of German suitors. No advocate of the Court of Paris, it was said, could advise or defend a subject of an enemy power, unless he had been authorized by the *batonnier* to do so, and this was the view of the tribunals of the Seine and of Marséilles in the cases referred to above. The contention that taking the case of an enemy client was a "contract" forbidden by the decree of September 27, was, however, vigorously attacked by Prof. Barthélemy (*L'Accés des Sujets Ennemis aux Tribunaux Français*, 43 Clunet, p. 1487) and by M. Clunet (*Concours professionnelle des advocats aux Sujets Ennemis et le Barreau de Paris*, 43 Clunet, pp. 14-18). Such an interpretation, says Barthélemy, is "purely literary, pharisaic, judaic, contrary to the intention of the legislature and in effect leads to the infliction of a sort of civil death upon enemy subjects by depriving them of their judicial personality." M. Clunet adds that enemy subjects have a right under international law and the municipal law of France to retain the services of members of the bar. He cites a number of cases in which the courts had upheld the right of enemy subjects to employ counsel and the right was affirmed by the fourth chamber of the Court of Appeal of Paris on April 20, 1916. The Court of Cassation (November 19, 1914) appears also to have admitted the right. President Monier of the tribunal of the Seine in the case referred to above, however, took occasion to say that "it was to the honor of the Paris solicitors that no one had claimed the right to defend a German" (43 Clunet, 1308). This tribunal, as well as those of Marseilles (44 Clunet, 241) and Besançon (*ibid.*, p. 248), held that the decree of September 27 prohibited all *juridical* as well as *commercial* relations with enemy subjects and that the latter could not therefore retain an attorney. A German writer, Dr. Haber, in the *Juristische Wochenschrift* of April 15, 1916 (Fr. trans. in 44 Clunet, 448 ff.) contrasting the German and French practice, remarks that if the decree of September 27 prohibited a German from hiring a French lawyer, it prohibited him from buying food or clothes from a Frenchman. M. Valéry (42 Clunet, 1009 ff.) suggested that one way out of the difficulty would be to allow enemy subjects to choose a curator *ad hoc* to represent them before the courts. The matter not having been determined by legislation it was left to the courts to deal with the question whenever it arose, each according to its own individual opinion.

*The Right to Sue Defended by High French Authority.*—The decision of the tribunal of the Seine and the doctrine of Valéry, Courtois, and others, that enemy subjects have no standing in the courts was vigorously attacked by a number of French jurists, among whom were Renault, Weiss, Clunet and Barthélemy. Professor Barthélemy in an able discussion of the question[81] asserts that the old doctrine enunciated by the *Parlement* of Douai in 1704 is not in accord with modern French law or practice. Modern French law, on the contrary, he says, is in favor of the right of enemy subjects to sue in the courts of France and in fact this right was recognized throughout the nineteenth century.[82]

The modern theory, he argues, is that war is a contest between the armed forces of states and not a struggle between peoples. Noncombatant subjects of the contesting powers are not at war with one another and, he adds, it is the duty of the French courts "to preserve in the midst of the present storm the small flame which still burns at the end of the taper of international law."[83] No argument, he says, can be drawn today from the principle of the civil code, which was hostile to the rights of foreigners; its doctrine is out of date, the principle of modern law being that enemy subjects must be treated as ordinary aliens are treated, subject to the precautions necessary to protect the state against injury. The state may prohibit its own nationals from entering into new juridical relations with enemy subjects and it may modify old rules whenever those relations would have the effect of increasing the resources or strength of the enemy, but to close the courts to enemy subjects and deny them the protection of the law is not justified by considerations of national defense. The purpose of judicial actions is merely to determine juridical situations; if the result of a suit in a particular case is a judgment in favor of an enemy subject and if the payment of the sum recovered would be prejudicial to the national interests, the govern-

[81] *L'Accés des Sujets Ennemis aux Tribunaux Français* in Clunet's *Journal*, T. 43, pp. 1473-1504.

[82] In support of this statement M. Barthélemy cites Merlin, *Répertoire, Sub Verbo, Guerre;* Massé, *Le Droit Commerciale,* Vol. I, p. 128 and Nys, *Le Droit Int.*, Vol. III, p. 69.

[83] *Ibid.*, p. 1480.

ment has only to suspend the execution of the judgment and thus protect the country against possible injury.[84] That is permissible but there is no sound reason for refusing to an enemy subject the privilege of having his legal rights adjudicated and determined by the courts. The power of the courts, he adds, to suspend or extinguish the legal rights of enemy subjects was forbidden by clause 23h of the fourth Hague Convention of 1907 to which France was a party, and while Germany had not strictly conformed her conduct to its provisions, she had not, as many Frenchmen seem to have assumed, closed her courts to French nationals residing in the German Empire but only to those domiciled *outside* German territory, and even these were allowed to sue with the permission of the Chancellor. Moreover the German courts were open for actions arising in connection with enemy branch houses and establishments, when the principal establishments were situated in Germany.

President Monier's contention that the prohibition laid down in clause 23h was not binding upon the French tribunals since it had been overridden by the terms of the decree of September 27 was extraordinary and unwarranted. The prohibitions of the decree of September 27 had not in fact modified the rule laid down in clause 23h nor had there been any intention so to do. That decree had reference only to *commercial* agreements or acts, and not to such relations as are involved in the bringing of judicial actions, including the employment of solicitors for the purpose of prosecuting a suit or defending an action. If the right of defense were allowed to an enemy subject who had committed a crime against a Frenchman, as it had in fact been done, and yet an innocent and unoffending German were denied the right to appear as a plaintiff against one who had committed a wrong against him, or to resort to the courts for the purpose of enforcing the terms of an unobjectionable contract, it would, as M. Barthélemy remarks, be a strange contradiction indeed. Finally, he pointed out that English practice was less rigorous than that followed

[84] M. Reulos (*Manuel des Séquestres*, p. 216) remarks, however, that the theory that an enemy alien shall be permitted to maintain an action in the court, but in case he obtains a favorable judgment, its execution may be suspended, rests on a subtle distinction and that in practice the right would be of no value to the enemy litigant.

by some of the French courts, for in England interned enemy subjects —and this included practically the whole enemy population—were allowed access to the courts both as plaintiffs and defendants.[85]

This liberal and enlightened view, highly creditable to the distinguished jurist who enunciated it, was adopted by M. Edouard Clunet, the learned editor of the *Journal du Droit International Privé*.[86] M. Clunet, like M. Barthélemy, attacked the old doctrine laid down by the *Parlement* of Douai as being contrary to the fundamental theory of modern law. He admits that the right of enemy subjects to sue might be abrogated by statute, yet it had never been done by France during any of the wars of the nineteenth century to which she was a party[87] and it was not the intention of the decree of September 27, 1914, to do so. Like M. Barthélemy, he holds that the right to sue was guaranteed by clause 23h of the Fourth Hague Convention of 1907, and without answering the question which he himself raises as to whether the French legislature could modify the rule embodied in the Hague Conference, he was firmly of the opinion that it had not in fact done so. Finally, he pointed out that no danger to the national interests would result from the opening of the courts to alien enemies, because the government was still free to suspend the execution of any judgment or the enforcement of any decision the execution or enforcement of which would be detrimental or dangerous to the country.[88]

*The Right to Sue Affirmed by Some French Courts.*—In a number of cases—in fact in the majority of those in which the question was raised—the French tribunals and courts upheld the right of

[85] The French courts, which closed their doors to German subjects sometimes, however, showed more consideration for enemy aliens of other races. Thus a Bulgarian who had a *permis de séjour* was allowed to bring an action (Trib. of Seine, March 13, 1917, 44 Clunet, 1481), and so was an Alsatian of French origin who was provided with a tricolor card (*ibid.*, T. 44, p. 1071).

[86] See his article entitled *Les Sujets Ennemis Devant les Tribunaux Français Jour. du Dr. Int.*, T. 43, pp. 1089-94.

[87] As authority on this point he quotes Massé *Le Droit Commerciale*, Vol. I, p. 128.

[88] For a German criticism of the French doctrine and practice, see an article by Dr. Karl Hirschland in the *Juristische Wochenschrift*, September 15, 1916, French text in 44 Clunet, pp. 87 ff. See also an article by Dr. Haber of Leipzig, in the same publication, April 15, 1916 (French trans. in 44 Clunet, pp. 448 ff.).

enemy subjects to sue both as plaintiffs and defendants.[89] The Council of Prizes also allowed enemy claimants to appear and defend their claims to ships and goods which were the object of prize proceedings. These decisions, so favorable to the rights of enemy aliens, however, provoked considerable criticism in France and the question was taken to the Court of Appeal of Paris, the 4th Chamber of which on April 20, 1916, rendered a notable decision upholding the right of enemy aliens to sue in the courts of France.[90] "This right," said the Court of Appeal, "must be considered to be one of the natural rights which foreigners enjoy in France, so long as there is no express provision to the contrary in the municipal law or international conventions." It was a right that had been secured to enemy aliens by Article 23(h) of the Fourth Hague Convention and it had not been abrogated by any law or decree of the French Government.

The decree of September 27, 1914, as every exceptional law which

[89] See especially the decision of the 10th Chamber of the Tribunal of the Seine in the case of *Gieb Cie. Gén. des Voitures*, January 9, 1915 (42 Clunet, pp. 62 ff. and 509 ff.); the decision of the same tribunal in the case of *Doyen, Orenstein and Kuppel* (43 Clunet, p. 974); and the decision of the Court of Appeal of Rouen, May 17, 1915 (*ibid.*, p. 1095); of the tribunal of Alger, July 22, 1915 (*ibid.*, p. 903); of the tribunal of Epinal, August 27, 1915 (*ibid.*, p. 262); of the tribunal of Nice, April 20, 1916 (*ibid.*, p. 1311); and the Court of Appeal of Aix, October 6, 1916 (44 Clunet, p. 717). The Court of Appeal of Alger in the important case of the *Vulcan Coal Company* decided on July 22, 1915, declared that "according to a principle of the law of nations, belligerent states alone are enemies, not the citizens thereof; consequently, the nationals of each such state have free access to the courts of the enemy country." (Text in Clunet, T. 42, pp. 903 ff.)

As to decisions affirming the right to sue, see the article of M. Clunet, *Les Sujets Ennemis*, etc., Clunet's *Journal*, T. 43, pp. 1089 ff., and the article of Barthélemy, cited above, 43 Clunet, pp. 147 ff.

[90] *Campagnie Bulgaria* v. *Olivier*. Text in Phily. *Jurisprudence Speciale*, Pt. III, pp. 749 ff.; 43 Clunet, pp. 380 ff., and Troimaux, pp. 186 ff. See also 43 Clunet, p. 1001. A history of this interesting case may be found in Troimaux, *Séquestres et Séquestrés*, pp. 163 ff. The case involved the right of an enemy insurance company to appeal from the decision of a tribunal to the *Cour d'Appel*. The *Avocat Général*, M. Godefroy, made a strong argument in favor of the right of enemy aliens to plead in the French courts, on grounds of justice and French precedents. There could be no danger, he contended, in allowing enemy subjects to exercise this right, for if they obtained a judgment the execution of which would in any way prejudice the national defense the government had the right to suspend execution.

introduces new principles, must, said the court, be strictly interpreted and in the light of existing laws and general principles. It was, as clearly appeared from the report on which it was based, designed to prohibit only *commercial* relations with the enemy and was not intended to interdict so-called civil agreements or acts. A distinction was made by the court between the *enjoyment* and the *exercise* of a right; an enemy alien might therefore be permitted to have his rights determined judicially even when, for reasons of public policy, he might be temporarily refused the benefit of the judgment recovered.[91] There were no considerations of public order or national defense why the legal rights of enemy subjects should not be determined by the courts even if it were deemed expedient to suspend during the war the enforcement of them. This decision was undoubtedly in harmony with the spirit of modern law and liberal practice and it was strongly approved by jurists like Renault, Weiss, Barthélemy and Clunet.[92] It was, however, the object of much criticism in and out of parliament[93] and a bill was promptly introduced in the Chamber of Deputies, the purpose of which was to overrule the decision. The bill passed the Chamber but it appears never to have received the approval of the Senate. The right of enemy subjects to sue therefore remained to be determined by the courts in each particular case as it arose. Some have followed one rule, some another.[94] As yet the Court of Cassation

[91] President Monier, of the Tribunal of the Seine, in his decision of May 18, 1916, referred to above, asserted that the distinction between the enjoyment and the exercise of a right and that the former might be preserved while the latter was suspended, was illogical. Such a distinction, he said, was not authorized but, on the contrary, was repudiated by the texts and rested on a confusion of ideas. Barthélemy and Clunet while supporting the right to sue nevertheless criticise the distinction (Clunet, T. 43, p. 1094).

[92] Clunet remarks that it was "irreproachable."

[93] See, for example, the criticism of Troimaux, *op. cit.*, pp. 171 ff., who pronounced it "detestable," contrary to French precedent and doctrine, in violation of the decree of September 27, and unjustified in view of German practice in respect to the right of French nationals to sue in German courts. See also Théry, *Recevabilité des Sujets Ennemis à Ester en Justice en France* (44 Clunet, pp. 480 ff.), who ridicules the proposition that the privilege of access to the courts is a "natural right."

[94] It appears that in some instances the courts hesitated to open their doors to enemy litigants for fear of exposing themselves to insults and attacks from the populace and the press. Others, embarrassed by the difficulty of reaching

has not passed on the question. It was unfortunate that the matter was never definitely settled by an Act of Parliament in the interest of certainty and uniformity of practice. It was a question of public policy which should have been dealt with by legislation and not left to the discretion of the courts with their conflicting opinions.

### GERMAN, AUSTRIAN AND ITALIAN PRACTICE

*The German Ordinance of August 7, 1914.*—By an ordinance of the *Bundesrath* of August 7, 1914, issued in pursuance of authority granted by an act of the German parliament of August 4, the right of all persons who had their domicile (*wohnsitz*) abroad,[95] and all corporations (*juristische personen*) which had their seat in foreign countries to maintain actions in the German courts for the recovery of debts or either patrimonial claims (*Vermogensrechtlichen ansprüche*) occurring before July 31, 1914, was suspended until October 31, 1914. Actions instituted prior to the taking effect of the ordinance were likewise suspended until the latter date. The Chancellor was, however, authorized to make exceptions in individual cases to the rule thus laid down, but it is not probable that any exemptions were ever granted to enemy aliens. He was also authorized to extend the application of the provisions of the ordinance to branch establishments of enemy nationality—without regard to their domicile or situs.[96] The

a decision because of the vagueness of the decree of September 27, refrained from pronouncing judgments, this notwithstanding the fact that Article 4 of the code civil enacts that "the judge who refuses to decide a case under the pretext of silence, obscurity or insufficiency of the law shall be prosecuted for denial of justice." In still other cases the judges suspended decision pending the action of parliament.

[95] Presumably without destinction as to whether they were domiciled in neutral or enemy territory. But by an ordinance of June 25, 1915, persons domiciled in Switzerland, if not enemy subjects, were allowed to sue in the German courts. 43 Clunet, p. 1166.

[96] Text of the ordinance in *Die Kriegsnotgesetze für das Reich und Preussen*, Bd. I, S. 64; French translation of the text in Reulos, *Manuel des Séquestres*, p. 478. See also an analysis in the London *Solicitors Journal* of November 7, 1914.

By a German ordinance of December 2, 1916, enemy subjects, companies and associations domiciled in enemy country were prohibited from bringing suits in Belgian courts for the enforcement of pecuniary claims. *Int. Law Notes*, January, 1917, p. 15.

duration of the decree appears to have been extended from time to time, so that whereas it was ostensibly intended at first to be only a temporary measure it was in fact made permanent.

*Its Weight and Effect.*—It will be seen from an examination of the ordinance that the test of enemy character, so far as judicial capacity was concerned, was domicile rather than nationality. Under the terms of the ordinance enemy subjects domiciled or resident in the Empire were free to maintain actions in the German courts without restriction, both as plaintiffs and defendants, and apparently without regard to whether the litigant was interned in a concentration camp or not. The same liberty was accorded to the local branches of houses whose main establishments were situated in foreign countries. Even as to enemy subjects domiciled abroad the right to maintain actions in respect to property rights accruing after July 31, 1914, remained in effect. Likewise actions other than those for the recovery of debts and the enforcement of property rights, such as those relating to civil status, guardianship, etc., could be maintained by enemy subjects residing outside the Empire.[97] Finally, enemy subjects even when residing in enemy territory were allowed the right of defense in actions brought against them in the German courts.

In theory, therefore, apparently the only persons to whom the German courts were closed were those domiciled *outside* the Empire and establishments whose head offices were situated in foreign countries. Local branch houses were free to maintain actions, as were persons domiciled in the Empire. It would seem therefore that the impression which appears to have gained currency in France that Frenchmen residing in Germany had no *persona standi in judicio* was without foundation.[98] There is little available information now as to the

[97] Huberich remarks that non-residents were exposed to one practical difficulty in maintaining actions in the German courts, in that they were required to give security for costs and no appearance could be entered without a written power of attorney. Ignorance of this rule caused many defendants resident in England and who were cited by substitute service but who failed to appear, to be judged by default and execution levied on their property. Note in the *Jour. of the Soc. of Comp. Leg.*, January, 1915, p. 54.

[98] This was pointed out by Barthélemy and Clunet in the articles cited above. Compare also Huberich "German Emergency Legislation Affecting Commercial

manner in which the German ordinance was carried out, but French writers admit that instances are not lacking in which Frenchmen were allowed to maintain actions and appear as defendants.[99] Nevertheless, the practical difficulties encountered in exercising the privilege granted appear to have been insurmountable in many cases.[100]

The *Reichsgericht* rendered a decision on July 8, 1915, in which it upheld the right of English subjects domiciled in the Empire to sue in the German courts for the recovery of money due them on contracts, notwithstanding the English prohibition in respect to payments due German subjects.[101] German writers in fact assert that no restrictions were placed upon the right of enemy subjects domiciled in the Empire to bring actions in the courts, that no question was ever raised as to the right of German attorneys to take the cases of such persons and that there were no instances in which members of the German bar refused to defend enemy persons against whom suits were instituted.[102]

*Austrian Policy.*—The Austrian Government appears to have pursued a liberal policy. By an ordinance of October 7, 1915, enemy enterprises were allowed to bring actions with the consent of the

Matters," in *Law Notes* for June, 1915, p. 48, and the *Jour. of the Soc. of Comp. Leg.*, January, 1915, p. 55, which thus described German policy:

"Suffice it to say that the emergency provisions, taken as a whole, are creditable to Germany and its jurisprudence. They exhibit no spirit of vindictiveness. If there is retaliation, it is only resorted to where the rights conceded by Germany are refused by us. The disabilities and prohibitions, in a word, are no more that the reasonable safeguards which a belligerent may exact in the presence of that hideous anomaly—War."

[99] See Barthélemy in 43 Clunet, p. 1446, and Clunet, *ibid.*, T. 42, p. 567, and T. 43, p. 1131. See also an article by Dr. Arthur Curti, a Swiss jurist, entitled *De la Condition des Sujets Ennemis Selon la Législation et la Jurisprudence Allemandes*, 42 Clunet, pp. 785 ff.

[100] G. F. in an article entitled *Accés des Sujets Ennemis aux Tribunaux Allemands*, in 44 Clunet, pp. 48 ff., calls attention to various other difficulties which made recourse to the German courts by enemy subjects, either as plaintiffs or defendants, even where the right was accorded by law, a practical impossibility.

[101] Soergel, *Kriegsrechtsprechung und Kriegsrechtlehre*, pp. 99, 111.

[102] See an article dealing with the right of enemy aliens to sue in German courts and to employ attorneys, by Dr. Haber, of Leipzig, in the *Juristische Wochenschrift* of April 15, 1916, reprinted in French in 44 Clunet's *Journal*, pp. 448 ff.

surveillant. In the case of *Attenbach* v. *Kornfeld,* a French haberdasher of Vienna, who returned to France at the outbreak of the war, was allowed to hire an attorney and bring an action against an Austrian for the recovery of a debt incurred before the war. The State was interested, said the court, in seeing that Austrian debtors performed the stipulations of their contracts with enemy houses. Judgment was decreed in favor of the Frenchman although the amount decreed was placed in the hands of the surveillant to be held by him until the end of the war.[103]

*Italian Policy.*—By a decree of June 24, 1915, the Italian Government prohibited the bringing of suits in the Courts of Italy by persons of Austrian or Hungarian nationality or persons resident in Austria or Hungary. All pending suits were suspended during the duration of the war and the statutes of limitation were likewise suspended. By a decree of July 18, 1916, the provisions of the above-mentioned decree were extended to all persons who were the subjects of any state at war with Italy, to all persons resident in such a state and to all persons who were subjects of or resident in the territory of the ally of an enemy.[104]

JAMES W. GARNER.

[103] Communication by Professor Basdevant of Grenoble, in 44 Clunet, pp. 114 ff.

[104] Huberich, Trading with the Enemy, p. 12.